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No. 91-1582

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

ELLWEST STEREO THEATRES OF MEMPHIS, INC., dba EXECUTIVE SOUTH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the rebuttable presumption in 18 U.S.C. 1466(b) violates due process.

2. Whether, under the facts of this case, a rational jury could infer that petitioners were engaged in the business of selling obscene matter because they offered two copies of an obscene item for sale at one time.

3. Whether the definition of "engaged in the business" in 18 U.S.C. 1466 is unconstitutionally vague.

4. Whether instructing the jury on the basis of a permissive inference after petitioners rested their case precluded them from presenting evidence to rebut the inference.

5. Whether the district court's jury instructions on the application of "contemporary community standards" were correct.

6. Whether the district court properly refused to excuse a prospective juror for cause.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-13, is unpublished, but the judgment is noted at 952 F.2d 404 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1992. A petition for rehearing was denied on February 27, 1992. Pet. App. 14-15. The petition for a writ of certiorari was filed on March 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioners were convicted of engaging in the business of selling obscene matter, in violation of 18 U.S.C. 1466.[1] Petitioner Ellwest Stereo Theatres of Memphis, Inc. (Ellwest) was fined $50,000. Petitioner Charles Long was sentenced to 20 months in prison, to be followed by two years of supervised release, and he was fined $7,500. Petitioner Rodney Skinner was sentenced to 18 months in prison, to be followed by two years of supervised release, and he was fined $2,000. Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. 1-13.

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[1] 18 U.S.C. 1466 (1988) provided:

(a) Whoever is engaged in the business of selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any obscene book, magazine, picture, paper, film, videotape, or phonograph or other audio recording, which has been shipped or transported in interstate or foreign commerce, shall be punished [according to law].

(b) As used in this subsection, the term "engaged in the business" means that the person who sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit, although it is not necessary that the person make a profit or that the selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income. The offering for sale of or to transfer, at one time, two or more copies of any obscene publication, or two or more of any obscene article, or a combined total of five or more such publications and articles, shall create a rebuttable presumption that the person so offering them is "engaged in the business" as defined in subsection (b).

1. Ellwest owns and operates three adult bookstores in Memphis, Tennessee. Long was the president of Ellwest. Skinner was the secretary of the corporation and the manager of its three stores. Each store had a front portion where sexually explicit magazines and videotapes were sold, and a back portion where patrons could watch sexually explicit "peep shows" on videotape. On August 17, 1989, a Memphis police sergeant randomly selected and purchased a videotape entitled "Blacks and Blondes Vol. 7" at one of Ellwest's stores. A few hours later, a second Memphis police officer bought another copy of the same videotape at the same store. Pet. App. 2; Gov't C.A. Br. 4-7.

2. In response to a written juror questionnaire, prospective juror Ronald Caldwell indicated that he would find some of the contents of the film at issue personally offensive, but that he would be able to put aside his feelings and render a fair and impartial verdict. Pet. App. 93-96. The district court examined Caldwell at length about his responses. Pet. App. 97-100. Based on Caldwell's assurances that he could render a fair and impartial verdict and obey the court's instructions, the court refused to excuse him for cause. Petitioners subsequently exercised a peremptory challenge against Caldwell. Pet. App. 7-8; Gov't. C.A. Br. 34-37.

Prior to trial, petitioners moved to dismiss the indictment on the ground that the phrases "engaged in the business" and "regular course of trade or business" in 18 U.S.C. 1466 were unconstitutionally vague. The district court denied the motion. Pet. App. 19-28.

At trial, the district court ruled, Pet. 36-47, that Section 1466(b) employs an unconstitutional manda-

tory presumption to the extent that it provides, "The offering for sale of or to transfer, at one time, * * * two or more of any obscene article, * * * shall create a rebuttable presumption that the person so offering them is 'engaged in the business'." Rather than applying the statutory presumption, the district court charged the jury:

> In considering whether a defendant is engaged in the business of selling or transferring obscene matter, if you find that a person sold or transferred at one time two or more obscene items or two or more copies of an obscene item, you may find that that person is engaged in the business of selling obscene matter. Whether you choose to draw such an inference is strictly up to you.

Pet. App. 49.

Consistent with *Miller* v. *California*, 413 U.S. 15, 24-25 (1973), the district court also charged the jury:

> In order to decide that the video tape in question is obscene, you must decide that, number one, the main purpose of the material viewed as a whole and considered in relation to the intended and probable recipients is an appeal to the prurient interest in sex of the average person applying contemporary community standards.
>
> Number two, the second part of the test, the material viewed as a whole depicts, shows or describes sexual conduct in a way that is patently offensive to the average person applying contemporary community standards.
>
> Number three, viewing the material as a whole, it lacks serious literary, artistic, political or scientific value to the reasonable person.

Pet. App. 50-51.

The court's instructions further emphasized to the jury that "[t]he first two prongs of the three point test require that you apply contemporary community standards from the community from which you come." Pet. App. 52. The court elaborated as follows on that requirement:

> Contemporary community standards are set by what is in fact accepted in the community as a whole; that is to say by society at large or people in general and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept. It is a matter of common knowledge that customs change and that the community as a whole may from time to time find acceptable that which was formerly unacceptable, or not infrequently may find presently acceptable that which some particular group of the population may regard as unacceptable.
>
> In determining contemporary community standards, you may consider what is available in the community as a whole through various means of communications.
>
> Also, in considering the first two prongs of the test, your task is to evaluate what judgment would be made by a hypothetical average adult person applying the collective views of the adult community. These questions are not to be determined by the effect of the material on any particularly sensitive or insensitive person, nor on the most prudish or the most tolerant, but rather by the effect on and standards of the average adult who is a synthesis of all men and women.
>
> In deciding what conclusions the average person applying contemporary community standards would []reach in these respects, you are entitled to draw on your own knowledge of the

> views of the average person in your community. Contemporary community standards are set by what is acceptable in the community as a whole. In determining these standards, you are to consider the views of all adult members of the community. Obscenity is not a matter of individual taste. The question is not how the material impresses you as an individual, but rather how the average adult person of the community would view it.

Id. at 52-53.

3. After the jury returned its verdict, petitioners moved for judgments of acquittal or a new trial. The court rejected their claim that the court improperly forced them to use a peremptory challenge by not excusing venireman Ronald Caldwell for cause. The court noted that Caldwell had assured the court of his ability to be fair and impartial, and that, in any case, petitioners "were given two additional [peremptory] challenges during the jury selection process." Pet. App. 29-30.

The court also held that the timing of its decision to give an instruction on a permissive inference did not preclude petitioners from presenting evidence that the materials in their store, other than the videotapes purchased by the police, were not obscene. Pet. App. 32. The court noted that petitioners made their decision about what evidence to present with full knowledge that "the court had not made a definite ruling on the presumption issue," and that when the court issued its ruling, petitioners "did not ask to reopen their proof." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-13. The court did not consider petitioners' challenge to the constitutionality of the rebuttable presumption in

18 U.S.C. 1466(b), because the trial court had instructed the jury in terms of a permissive inference. Pet. App. 3-4. The court of appeals approved that instruction: "Since it is more likely than not that the sale of two obscene films indicates that an individual is engaged in the business of selling obscene matter, the inference suggested to the jury passes the rationality test outlined in [*United States* v. *Leary*, 395 U.S. 6, 36 (1969)]." Pet. App. 5.

The court of appeals next rejected petitioners' claim that the statutory term "engaged in the business" is unconstitutionally vague. The court noted that it had rejected a similar challenge to the federal firearms statute. Pet. App. 6 (citing *United States* v. *Day*, 476 F.2d 562, 567 (6th Cir. 1973)). The court added that "the 'two sale' definition found in the statute * * * unequivocally puts the public on notice of the level of activity that will support the drawing of an inference that an individual is engaged in the business of selling obscene material." Pet. App. 6.

The court of appeals also affirmed the district court's decision not to exclude juror Caldwell for cause. Pet. App. 6-8. The court noted that petitioners "were not entitled to a jury comprised of persons who approved of the content of the videotape," and it held that the district court "was warranted in concluding that this juror could set his personal convictions to one side and obey the court's instructions." *Id.* at 8.

Finally, the court of appeals rejected the contention that the district court improperly instructed the jury that the term "contemporary community standards" requires the jury to consider what is accepted, rather than what is tolerated, in the community. Pet. App. 8-9. The court acknowledged that dictum in *Smith*

v. *United States*, 431 U.S. 291, 305 (1977), discussed contemporary community standards in terms of the jury's understanding of the tolerance of the average person in the community. "Despite this language," the court held, "there is nothing in *Smith* that indicates that the Court intended to modify the seminal test outlined in *Miller v. California*, 413 U.S. 15, 32 (1973), which uses 'acceptance' language." Pet. App. 9.[2]

ARGUMENT

1. Petitioners contend that 18 U.S.C. 1466(b) violates due process because it contains a rebuttable presumption that a person is engaged in the business of selling obscene materials if he has sold two or more obscene items at one time. Pet. 4-6. The district court agreed that the presumption was unconstitutional; hence, the court instructed the jury only in terms of an inference—it instructed the jury that it could, but did not have to, infer that petitioners were engaged in the business of selling obscene material if it found that they had sold two or more obscene items at one time. Pet. App. 49. Because the district court agreed with petitioners' challenge to the rebuttable presumption and therefore did not instruct in terms of a presumption, the court of appeals correctly refused, *id.* at 4, to address the question whether the use of a rebuttable presumption violates due process. That issue is therefore not properly before this Court.

2. Petitioners contend that the district court violated due process by instructing the jury that it could, but did not have to, find that petitioners were engaged in the business of selling obscene materials if it found

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[2] The court also observed that the relevant portion of the jury charge was "taken verbatim from *Federal Jury Practice and Instructions*, § 62.07 (West 1977)." Pet. App. 9.

that petitioners sold two or more obscene items at one time. Pet. 6-9. As this Court has explained, however, such a permissive inference "violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.' *Francis* v. *Franklin*, 471 U.S. 307, 314-315 (1985). Because a permissive inference "leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *Ulster County Court* v. *Allen*, 442 U.S. 140, 157 (1979).

The court of appeals properly upheld the permissive inference on which the jury was instructed. Pet. App. 5. Common experience suggests that the offering for sale of two or more identical items at the same time suggests that the seller is in the business of selling those items. While there may be other explanations for a person's offering multiple copies of a particular item for sale, it is certainly rational for a finder of fact to infer from evidence of multiple sales of identical items that the seller is engaged in the trade of selling the items. Moreover, the circumstances of this case strongly supported that inference. Petitioners operated several stores in which sexually explicit materials were sold and exhibited in "peep shows," and the police officers who purchased the two copies of the videotape selected it at random. Gov't C.A. Br. 5-6. All of those facts are consistent with—indeed, they compel—the conclusion that petitioners were engaged in the business of selling the items that the police purchased at this store. Hence, "under the facts of the case," *Ulster County*, 442 U.S. at 157,

the jury could rationally infer that offering two copies of an obscene videotape for sale at one time showed that petitioners were engaged in the business of selling obscene material. In the absence of any authority holding that the use of a permissive inference under Section 1466 violates due process, further review is unwarranted.

3. Petitioners next contend that the term "engaged in the business" in 18 U.S.C. 1466 is unconstitutionally vague. Pet. 9-12. A penal statute must define an offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); see *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). The detailed and explicit definitions in 18 U.S.C. 1466 satisfy that requirement. Section 1466(b) defines the phrase "engaged in the business" to apply to "the person who sells or transfers or offers to sell or transfer obscene matter[,] devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit, although it is not necessary that the person make a profit or that the selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income." In addition, the definition of "engaged in the business" is patterned on the definition of the same phrase in the federal firearms statute. See 18 U.S.C. 921(a)(21); 134 Cong. Rec. E3752 (daily ed. Nov. 10, 1988) (remarks of Rep. Hughes). Hence, there is an existing body of law that informs the meaning of term "engaged in the business." Finally, as the court of appeals noted, Section 1466's reference to the sale of two items of obscenity puts the public on notice that that level of

activity can support an inference that a person is engaged in the business of selling obscenity. Pet. App. 6. Petitioners' claim does not warrant further review.

4. Petitioners contend that the timing of the district court's decision to instruct the jury on a permissive inference precluded them from presenting evidence to rebut that inference. Pet. 12-14. The record does not support that claim. Although the district court did not rule on the permissive inference instruction until after petitioners presented their case, petitioners knew that the court had "reserved the constitutional issue [regarding the presumption] for later determination." Pet. App. 32. Moreover, "when the court made its ultimate ruling on the presumption issue, [petitioners] did not ask to reopen their proof to present evidence concerning the materials in the store other than the movie that was the subject of the indictment." *Ibid.* The district court therefore properly concluded that petitioners' decision not to present any evidence about the other materials sold in their store was the product of trial strategy, and not the timing of the district court's ruling.

5. Petitioners also contend, Pet. 17-26, that the district court's instructions improperly defined "contemporary community standards" in terms of what is accepted, rather than what is tolerated, in the community as a whole. As petitioners concede, Pet. 18, however, this Court has alternatively referred to community "acceptance" or "toleration" of sexually explicit materials without suggesting that the two concepts are materially different. See, *e.g.*, *Miller* v. *California*, 413 U.S. 15, 32 (1973) (First Amendment does not require "that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City"); *New York* v. *Ferber*, 458 U.S. 747, 761 n.12 (1982)

(same). A jury instruction referring to "acceptability" rather than "tolerability" therefore satisfies the constitutionally approved definition of obscenity. See, *e.g.*, *United States* v. *Easley*, 927 F.2d 1442, 1446-1447 (8th Cir.), cert. denied, 112 S. Ct. 199 (1991); *United States* v. *Pryba*, 900 F.2d 748, 758-759 (4th Cir.), cert. denied, 111 S. Ct. 305 (1990); *United States* v. *Battista*, 646 F.2d 237, 245-246 (6th Cir.), cert. denied, 454 U.S. 1046 (1981); *Sedelbauer* v. *State*, 428 N.E.2d 206, 210-211 (Ind. 1981), cert. denied, 455 U.S. 1035 (1982).

In any case, use of the word "accept," rather than "tolerate," could not have made a difference in light of the entire jury charge in this case. Among the definitions of "accept" is "to take without protest; endure or tolerate with patience." *Webster's Third New International Dictionary* 10 (1986). In the context of the jury charge as a whole, it is evident that the term "accept" was used in that sense, rather than to suggest affirmative approval by the community. First, the instructions made clear that the jury was to evaluate what was "accepted in the community as a whole," and "not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept." Pet. App. 52. The use of the term "accept" in reference to an entire community cannot reasonably be understood to mean that the entire community must embrace the sexually explicit materials at issue; rather, it can sensibly be viewed only as requiring an evaluation of what the community at large would tolerate in its midst.

In addition, the court instructed that community standards "are not to be determined by the effect of the material on any particularly sensitive or insensitive person, nor on the most prudish or the most tolerant, but rather by the effect on and standards of

the average adult who is a synthesis of all men and women." Pet. App. 52. By referring to the "effect" of the materials on the average adult, and directing the jury not to consider the "the most tolerant" hypothetical member of the community, the charge can only be understood to require the jury to consider what the average member of the community would be able to tolerate, not what the average member would personally approve of or embrace. Thus, even if this Court's decisions required a charge that conveys the concept of tolerance, the jury charge given in this case would satisfy that requirement.

Finally, petitioners contend that the lower courts are in conflict over whether a jury in an obscenity case must be instructed to consider community tolerance, and not acceptance, of sexually explicit material. Pet. 21-22 & nn.17-20. Petitioners, however, have not cited, and we are unaware of, any court of appeals or state supreme court decision that conflicts with the unpublished decision below. Petitioners cite a number of cases that refer to the concept of community tolerance in passing, without addressing the issue raised here—whether an instruction that mentions and elaborates upon acceptability is constitutionally sufficient.[3] As petitioners concede, many of the cases they cite, like the decisions of this Court, refer interchangeably to tolerability and acceptability.[4] And

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[3] See, *e.g.*, *United States* v. *Peraino*, 645 F.2d 548, 551 (6th Cir. 1981); *United States* v. *Various Articles of Obscene Merchandise*, 600 F.2d 394, 406 (2d Cir. 1979); *State ex rel. Collins* v. *Superior Court*, 787 P.2d 1042, 1047-1049 (Ariz. 1986); *Commonwealth* v. *United Books, Inc.*, 453 N.E.2d 406, 410 (Mass. 1983); *State* v. *Taylor*, 664 P.2d 439, 448 (Utah 1983).

[4] See, *e.g.*, *United States* v. *Petrov*, 747 F.2d 824, 831 (2d Cir. 1984) ("A key issue in any obscentity case is the degree

numerous other decisions have explicitly rejected the argument that an instruction referring to acceptability is inconsistent with the First Amendment decisions of this Court.[5]

It is true that the Colorado Supreme Court has required a tolerance standard instead of an acceptance standard, but the court explicitly rested its holdings on the Colorado Constitution, which "extends broader protection to freedom of expression than does the first amendment to the United States Constitution." *People* v. *Ford*, 773 P.2d 1059, 1066 (Colo. 1989). The Tennessee Supreme Court, moreover, invalidated a state statute that determined what was

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of community acceptance or toleration of materials similar to those at issue."), cert. denied, 471 U.S. 1025 (1985); *United States* v. *Various Articles of Obscene Merchandise*, 709 F.2d 132, 136 (2d Cir. 1983) (alternatively discussing the "measure of community tolerance" and question whether materials "are acceptable to the average member of the community"); *United States* v. *Womack*, 509 F.2d 368, 379 (D.C. Cir. 1974) (referring alternatively to "community tolerance" and "community acceptance"), cert. denied, 422 U.S. 1022 (1975); *Dunlap* v. *State*, 728 S.W.2d 155, 160-161 (Ark.) (referring to "acceptance of * * * material" and to "evidence that community standards would tolerate the materials"), cert. denied, 484 U.S. 852 (1987); *State* v. *Short*, 368 So. 2d 1078, 1083 (La.) ("There was no other evidence of community acceptance or toleration, which * * * would have been material to the case."), cert. denied, 444 U.S. 884 (1979).

[5] *Easley*, 927 F.2d at 1446-1447; *Pryba*, 900 F.2d at 758-759; *Battista*, 646 F.2d at 245-246; *Sedelbaurer*, 428 N.E.2d at 210-211. Petitioners also suggest that there is a conflict among the state and federal courts concerning whether an instruction may refer to standards of "decency," rather than standards of community "tolerance." Pet. 21-22. Because the jury instruction in this case did not refer to a standard of decency, however, this case is not an appropriate vehicle for addressing the validity of an instruction that uses that term.

patently offensive in terms of what was "personally acceptable" to an average person. *Leech* v. *American Booksellers Ass'n*, 582 S.W.2d 738, 748 (Tenn. 1979). While the Tennessee Supreme Court analyzed federal cases interpreting the First Amendment, it ultimately concluded that "[i]ndependent of the United States Constitution," the reference to what is "personally acceptable" violated the Tennessee Constitution. *Ibid.* In any case, as discussed, the instruction here clearly does not call for the jury to find that an average member of the community would personally accept the materials at issue. Because there is no conflict in authority on the issue raised by petitioners, further review is unwarranted.[6]

6. Finally, petitioners contend that the district court improperly refused to excuse juror Caldwell for cause. Pet. 26-27. As the court of appeals explained, however, the district court did not abuse its discretion in overruling the challenge for cause, because Caldwell indicated that he "could set his personal convictions to one side and obey the court's instructions." Pet. App. 8. Petitioners' disagreement with the district court's exercise of discretion, based upon its observation of the juror and consideration of his assurances, does not warrant this Court's review.

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[6] Petitioners also argue, Pet. 15-17, that the concept of what is "accepted" in the community has no place in the determination of whether material appeals to the prurient interest. This Court, however, has made clear that contemporary community standards are relevant in determining whether material appeals to the prurient interest. *Miller* v. *California*, 413 U.S. at 24; *Smith* v. *United States*, 431 U.S. 291, 299-301 (1977); *Pope* v. *Illinois*, 481 U.S. 497, 500 (1987). Petitioners have cited no decision holding that a definition of community standards such as the one in this case is inappropriate in determining whether particular material appeals to the prurient interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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